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JURISDICTIONAL STATEMENT

This case involves interlocutory review of a discretionary class certification order entered in *Smith v. American Family Mut. Ins. Co., Case* No. 00-CV 211554, in the Circuit Court of Jackson County, Missouri. Class plaintiffs allege that American Family breaches its automobile insurance policy by paying only for cheaper inferior replacement crash parts ("non-OEM"), rather than quality original equipment manufacturer ("OEM") parts. Plaintiffs also assert that American Family uniformly omits certain necessary repairs from its estimates. A multi-state class of plaintiffs were paid for inferior non-OEM parts and/or were paid based on repair estimates which omitted necessary repairs. American Family challenges whether the "predominance" element of Rule 52.08 was satisfied, so that its due process rights were protected.

While class plaintiffs disagree that the writ of prohibition is warranted, this Court has original subject matter jurisdiction over this case pursuant to Article V, Section 4.1 of the Missouri Constitution. It states in relevant part: "The supreme court shall have general superintending control over all courts and tribunals. . .The supreme court. . .may issue and determine original remedial writs. Supervisory authority over all courts is vested in the supreme court which may make appropriate delegations of this power." In addition, Chapters 529 and 530 of the Revised Statutes of Missouri grant subject matter jurisdiction to this Court to issue remedial writs in prohibition.

STATEMENT OF FACTS

Plaintiffs have brought this breach of contract action on their own behalf and on behalf of a class of American Family insureds who are and were covered under American Family automobile insurance policies. Plaintiffs' Fourth Amended Petition alleges that American Family consistently and systematically breaches its policy contracts by paying its insureds based on repair estimates that specify the use on non-OEM parts. *See* plaintiffs' Appendix at A1-A23.[1] American Family's breach occurred in two ways: (i) insureds were only paid for inferior "crash parts"[2] manufactured without the benefit of the specifications and tolerances of the original equipment manufacturers; and

[1] The "Supplemental Appendix to Class Plaintiffs Brief on Behalf of Respondents" contains exhibits that were submitted on class certification and class certification orders from other courts relating to similar issues.

[2] "Crash Parts" include: fenders, hoods, doors, deck lids, quarter panels, rear outer panels, front end panels, header panels, door shells, pickup truck beds, box sides and tail gates, radiator and grill support panels, grilles, head and tail lamp mounting panels/brackets/housing/lenses, doors (excluding chrome), bumper covers/face bars, and bumper brackets/supports.

(ii) American Family uses an estimating software program that systematically omits payment for certain necessary repairs.[3] *Id*.

On August 1, 2001, plaintiffs filed a motion for class certification, pursuant to Supreme Court Rule 52.08. Following extensive briefing, from October 29, 2001 through November 7, 2001, the Honorable Thomas C. Clark held an evidentiary hearing to determine whether plaintiffs had met their burden under Rule 52.08. *See* Answer, Exh. 1, Vol. I, at 14-33.

The evidence presented during the eight-day hearing was extensive, if not exhaustive, and included approximately 17 testifying witnesses and hundreds of exhibits. *See* Answer, Exh. 1, Vol. I – VIII (complete hearing transcript). A number of witnesses testified before the court on a variety of subjects, including Paul Griglio, an automotive engineering expert, formerly employed in senior management positions by Ford, Chrysler and General Motors, who provided detailed testimony establishing the inferior nature of non-OEM parts. For two days, Mr. Griglio testified concerning the process that results in inferior non-OEM parts, including the fact that the flawed process begins with grossly inadequate design. *See* Affidavit of Paul Griglio, ¶14, plaintiffs' Appendix A24-A-34. Based on his years of industry experience, Mr. Griglio testified that because

[3]"Omitted Repairs" include: seat belt check, rust proofing, weld through primer, undercoating, flex additive, masking inner surfaces, front wheel alignment, four wheel alignment, aim lamps and replace EPA label.

manufacturers of non-OEM parts do not have access to the automobile manufacturers' specifications and tolerances for constructing crash parts, non-OEM manufacturers are forced to rely on the far less accurate process of reverse engineering. *Id.* at ¶13. Unable to replicate the thousands of dimensional points with separate tolerances, non-OEM parts lack the specifications, tolerances and critical safety areas of OEM crash parts. *Id.* at ¶12.

Plaintiffs further introduced evidence establishing that the inherent inferiority in the reverse engineering process is compounded by the sub-standard production and manufacturing process used by non-OEM crash part manufacturers relative to the OEM manufacturers. *Id.* at ¶15. Mr. Griglio explained that this was because the OEM manufacturing process involves the use of numerous complex processes using expensive, specially-designed dies and molds, and complex operating systems that ***must*** be used throughout production. *Id.* Such complex systems are unavailable to non-OEM crash parts manufacturers, with their smaller, less-funded manufacturing operations. *Id*. at ¶16.

Throughout the class certification briefing and live testimony, plaintiffs established that non-OEM parts lack "fundamental assurances of quality and consistency" and are inherently not equivalent to OEM crash parts. *Id*. at ¶¶11-12. Though class certification does not involve a determination of the merits, plaintiffs established that the issue of whether non-OEM crash parts are inherently inferior to comparable OEM crash parts can be established through evidence common to all class members, *id.* at ¶22, and indeed, throughout the eight-day evidentiary hearing, Judge Clark witnessed precisely how this would be done. This includes evidence comparing the design, manufacturing

and testing processes for both OEM and non-OEM parts. *See* Answer, Exh. 1, Vol. I at 144-163, 177-191, 198-241 and Vol. II at 248-295. No individual evaluation of non-OEM parts is necessary because they are the product of an inferior production process. *See id.*

Plaintiffs also introduced the testimony of Gerald E. DeRungs, an I-CAR certified repair technician with over 25 years of auto repair experience. *See id.*, Vol. II at 410-414, 426-427, 433-435. For two days, Mr. DeRungs testified that, based upon his extensive knowledge of American Family's ADP estimating software, the insurer systematically omits certain repairs that are essential if a vehicle is to be repaired in conformity with I-CAR standards, the recognized standards authority on proper repairs. *See id.* at 433-450.

Throughout the proceedings, plaintiffs further produced evidence showing that American Family adopted its non-OEM crash parts policy without any effort to evaluate, assess or analyze the quality of the non-OEM crash parts it specified for the repairs of its insureds' vehicles. In fact, American Family's own employees testified that no studies or tests were conducted in an effort to discern between the crashworthiness of different manufacturers' parts. Plaintiffs' Petition at 17. American Family nevertheless claims that the parts used to repair its insureds' vehicles were "of equal or better quality"[4] or of "like

[4]*See* plaintiffs' Appendix at A115. ("American Family is dedicated to providing the best repairs possible. We believe this commitment is fulfilled with the use of aftermarket parts (new replacement parts) ***of equal or better quality***, which cost less, than those originally on the vehicle.") (emphasis added); and plaintiffs' Appendix at 81. (Zweifel

kind and quality"[5] to OEM crash parts. American Family similarly claims that its non-OEM crash parts meet Federal Motor Vehicle Safety Standards,[6] are "certified," or that they meet any industry standard for material and workmanship.[7] American Family ceased using non-OEM crash parts supplied by Keystone, the largest supplier of such parts, because Keystone was sued by Ford Motor Company for making some false

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Dep. at 183:7-14 (American Family's position is that non-OEM Crash Parts are "equal in quality to, [] OEM")).

[5]In a May 1998 in-house publication, Darnell Moore, who at the time was American Family's Vice President of Claims, the highest ranking claims person in the company (*see* plaintiffs' Appendix at A80. Zweifel Dep. at 179:9-180:3)), was quoted as saying: "When paying for replacement parts, ***we do make sure they are of like kind and quality***." *See* plaintiffs' Appendix at A115. Mr. Moore has since been promoted to Executive Vice President of Administration. (*See* plaintiffs' Appendix at A80, Zweifel Dep. at 179:17-19).

[6]*See* plaintiffs' Appendix A115. ("Further, replacement parts for fenders, door panels, grilles and so on, meet federal safety standards.").

[7]*See* plaintiffs' Appendix A116. (Aftermarket parts warranties "material and workmanship [] meet or exceed generally accepted industry standards for replacement parts.").

representations regarding its aftermarket parts. *See* Answer, Exh. 1, Vol. IV at 734-735. (Moore testimony). In a press release issued by Keystone in 1992, Keystone admitted that its crash parts were not of "like, kind and quality" to new Ford crash parts:

- "Keystone crash parts may require substantial refitting during installation on Ford fittings"
- "Keystone maintains no independent quality control program or systems for its crash parts" and
- "Keystone crash parts may corrode at a faster rate than Ford crash parts."

Id. at 734-736. Yet, in August 1993, American Family once again began including Keystone non-OEM crash parts in their estimating system, not because Keystone's parts were now equivalent to manufacturer's crash parts, but because "the storm has calmed." *Id.* at Vol. IV at 740-742 (Moore testimony). In fact, American Family did nothing to test the quality, fit or corrosion of the Keystone non-OEM crash parts before or after they started using them again in August 1993. *Id.* at 741-742.

During the evidentiary hearing, plaintiffs established that in addition to industry testing evidencing the gross inferiority of non-OEM crash parts, American Family ignored complaints of body shops and its own insureds.[8] Plaintiffs also submitted

[8] *See* plaintiffs' Appendix, A101 (Zweifel Dep. at 263:10-265:1) (American Family failed to implement a system to track policyholder complaints with regard to Non-OEM Crash Parts).

evidence that American Family's Quality Control Analysts determined that the quality of non-OEM parts is inferior. In October 1994, Regional Quality Control Analyst Chuck Fravel e-mailed American Family's Home Office physical damage department with a stern warning:

> ***The policyholder backlash has been in a word, awesome****….*
>
> Our administrative costs for "damage control" to put out fires and the expense to redo the repair job a second time with OEM Crash Parts is extremely expensive. On top of that, after all is done to satisfy the insured, we sometimes lose them as policy holders because of the problems incurred....
>
> We work very hard on selling aftermarket parts to insureds, claimants, body shops and the agency force. We can and are very successful in selling aftermarket sheet metal on older and high mileage vehicles. ***Seriously, I must state for the record, most of the sheet metal parts do not fit as good as OEM. The stampings are not as good****.*

See plaintiffs' Appendix at A121.

Despite all evidence to the contrary, American Family rigidly adhered to its policy of using the clearly inferior non-OEM crash parts to maximize its profit margin. *See* plaintiffs' Appendix, A101 (Zweifel Dep. At 30:4-60). Although the evidence showed that the use of non-OEM crash parts enabled American Family to save $9.5 million in 1998, alone, no savings were ever passed on to the insureds by way of lower premiums.

See American Family's memorandum re aftermarket parts usage reports for 1988 (Ex. 46 to motion for class certification). In fact, one of American Family's two expert economists, Christopher Pflaum, testified that he saw no evidence of whether premiums had ever been reduced as a result of American Family's use of the cheaper non-OEM parts. *See* Answer, Exh. 1, Vol. VI, at 1161-1192, 1200-1203.

American Family was permitted by the trial judge to call seven witnesses, including the executive vice president of American Family, a corporate claims staff administrator, an adjuster, and four experts, including two economists. *See* Exh. 1, Vol. I-VIII. To rebut the testimony of plaintiffs' expert Mr. Griglio, American Family's experts, including Don Parker, a design analysis engineer, brought vehicle parts to the courtroom for Judge Clark's evaluation. *Id*., *see also* Exhibits E and F to American Family's petition for writ to the Missouri Court of Appeals. While the Court made clear that it was not deciding the merits of plaintiffs' claims, American Family was given extensive latitude in proffering any evidence they believed would support their position that a determination of liability could not be made on a classwide basis.

On December 14, 2001, after considering the immense quantity of evidence presented, both during the evidentiary hearing and the extensive briefing,[9] Judge Clark considered the facts and the law in exercising his discretion and issued an Order

[9]American Family's Opposition Suggestions alone spanned 72 pages, not including the three volumes of evidentiary material provided to the Court in support.

certifying a plaintiff class. *See* Exhibit B to Petition for Writ. The Order addressed every element of Rule 52.08(a) and (b) and specifically acknowledges the Court's continuing authority to modify, correct, restrict or amend the Order as the case progresses.[10] *Id.* The order was predicated on evidence showing that American Family treats all of its policyholders the same, regardless of geographic location. Additionally, each American Family insurance policy contract contains identical language requiring American Family to ***pay money*** in the event of a collision loss. *See* Answer, Exh. 6 (policy language); *see also* American Family's brief at p. 65 (admission that policy language is uniform). In doing so, American Family employs a uniform and nationwide policy of specifying substandard imitation parts on, and omitting necessary repairs from, its repair estimates on which it bases its final claim payment. Contrary to American Family's representations, no state permits substandard parts to be specified for use by automobile insurers. *Avery v. State Farm*, 321 Ill. App. 3d 269, 282 (2001); *see also* Angoff Aff., ¶ 3, plaintiffs' appendix at A199.

[10]Judge Clark volunteered to reassign the case following entry of the class certification order. The Order was served on plaintiffs, who did not realize the Court wanted them to serve it on defendants resulting in a two week delay of service, Judge Clark volunteered to permit reassignment of the case following this clerical error, if either of the parties requested it. American Family so requested, and Judge Messina now presides.

Further, the evidence established that American Family does ***not*** repair vehicles; it only pays to repair its insureds' vehicles. *See,* e.g., Answer, Exh. 1, Vol. IV at 710-713 (Moore Testimony); and Vol. IV at 805-807 (Canney testimony). American Family does not repair or restore vehicles. At most, American Family writes the repair estimates (although this can be done by the repair shop) and writes a check for the repairs. The repair shop performs the actual repairs. *See* Plaintiffs' Appendix at A145 Pawlowski deposition at 95-96).

Q. Does American Family repair its vehicles to I-CAR standards?

A. Well, American Family doesn't repair vehicles.

Q. To what standard does American Family repair a vehicle?

A. Well the only standard is that we repair cars back to what we think are I-CAR standards. And then past that, I mean, we don't repair vehicles. We write estimates, provide money.

See Plaintiffs' Appendix, A169, A177 (Garafola deposition).

In every state and on every claim, American Family simply writes a check for only the amount of the final estimate. *Id.* The evidence presented established that there was no need to look at each class member's vehicle, since American Family's breach is complete at the time payment is made to the insured, and this breach is documented by the repair estimate.

Shortly after receipt of the hearing transcript in late May 2002, American Family sought extraordinary relief from the Missouri Court of Appeals, Western District, on

June 3, 2002. Case No. WD61465. On June 4, 2002, the writ division of the Western District Court of Appeals entered an order directing Respondents to show cause before June 14, 2002 why the petition should not be granted. *See* Petition for Writ, Exh. C. Plaintiffs answered, and on June 26, 2002, the writ division denied American Family's petition. *See* Petition for Writ, Exh. D. American Family then applied for, and was granted review by the Supreme Court.

Now, after a lengthy process of appellate application and review, American Family requests the Supreme Court reassess and reevaluate the findings of the trial judge, which were issued after extensive evaluation the case's viability as a class action. Both American Family and the class were afforded ample opportunities to produce a tremendous amount of evidence in support of their respective positions. Obviously disappointed with the result, American Family now asks this Court to do what it must not: reevaluate the evidence presented and overturn the discretionary decision based thereon by Judge Clark.

POINTS RELIED ON

I. THE TRIAL COURT PROPERLY CERTIFIED THE MULTI-STATE CLASS AND THE CERTIFICATION ORDER DOES NOT VIOLATE THE DUE PROCESS OR FULL FAITH AND CREDIT CLAUSES OF THE CONSTITUTION BECAUSE EACH ELEMENT OF RULE 52.08 WAS SATISFIED, INCLUDING THE REQUIREMENT THAT COMMON ISSUES OF FACT AND LAW PREDOMINATE, IN THAT:

(A) MISSOURI LAW IS CONSTITUTIONALLY APPLIED TO ALL PLAINTIFFS' BREACH OF CONTRACT CLAIMS SINCE THERE IS NO VARIATION IN THE SISTER STATES' CONTRACT LAWS REQUIRING THEIR APPLICATION, INCLUDING STATE INSURANCE REGULATIONS THAT DO NOT AUTHORIZE USE OF CATEGORICALLY INFERIOR "NON-OEM" REPLACEMENT PARTS, AND THUS NO OTHER STATES' SOVEREIGNTY OR JURISPRUDENCE IS THREATENED;

(B) THE OVERRIDING COMMON ISSUE OF BREACH OF CONTRACT, EITHER ALONE OR COMBINED WITH PROOF OF OTHER CLASS-WIDE COMMON ISSUES OF FACT AND LAW, JUSTIFIES THE TRIAL COURT'S DISCRETIONARY RULING UNDER RULE 52.08(B) THAT COMMON ISSUES PREDOMINATE;

(C) THE OTHER ALLEGED "VARIATIONS" AS TO CERTAIN AFFIRMATIVE DEFENSES LIKEWISE ARE NOT "TRUE CONFLICTS" REQUIRING APPLICATION OF ANOTHER STATE'S LAW AND DO NOT DEFEAT CLASS CERTIFICATION; AND

(D) THERE IS NO INDICATION IN THE ORDER OR OTHERWISE IN THE RECORD THAT THE TRIAL COURT INTENDS TO APPLY MISSOURI LAW TO NON-RESIDENT CLAIMS IF A "TRUE CONFLICT" EXISTS.

Principal Authorities:

Rule 52.08

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985)

Reis v. Peabody Oil Co.,
997 S.W.2d 49 (Mo. App. 1999)

State ex rel K-Mart Corp. v. Holliger,
986 S.W.2d 165 (Mo. banc 1999)

State ex rel Byrd v. Chadwick,
956 S.W.2 d 369, 376 (Mo. App. 1997)

Avery v. State Farm Mutual Insurance Company,
746 N.E.2d 1242 (Ill.App. 2001)

II. THE PRELIMINARY WRIT OF PROHIBITION SHOULD BE QUASHED BECAUSE THE CLASS CERTIFICATION ORDER DOES NOT VIOLATE AMERICAN FAMILY'S DUE PROCESS RIGHTS BY FAILING TO SATISFY THE PREDOMINANCE REQUIREMENT OF RULE 52.08 IN THAT THE TRIAL COURT PROPERLY DETERMINED THAT PLAINTIFFS' CLAIMS AND CLASS-WIDE PROOF—RATHER THAN DEFENDANT'S THEORY OF BREACH—GUIDED ITS ANALYSIS OF PREDOMINANCE AND PROPERLY CONCLUDED THAT FOR PURPOSES OF CLASS CERTIFICATION NEITHER A VEHICLE'S PRE-LOSS NOR POST-REPAIR CONDITION WERE RELEVANT INQUIRIES SINCE AMERICAN FAMILY IS REQUIRED TO PAY FOR

PARTS OF "LIKE, KIND AND QUALITY" TO OEM PARTS AND DOES NOT CONSIDER THE ISSUES WHEN IT SPECIFIES NON-OEM PARTS IN AN ESTIMATE.

Principal Authorities:

Rule 52.08

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974)

Wakefield v. Monsanto Co.,
120 F.R.D 112 (E.D. Mo. 1988)

Jackson v. Rapps,
132 F.R.D. 226 (W.D. Mo. 1990)

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY CERTIFIED THE MULTI-STATE CLASS AND THE CERTIFICATION ORDER DOES NOT VIOLATE THE DUE PROCESS OR FULL FAITH AND CREDIT CLAUSES OF THE CONSTITUTION BECAUSE EACH ELEMENT OF RULE 52.08 WAS SATISFIED, INCLUDING THE REQUIREMENT THAT COMMON ISSUES OF FACT AND LAW PREDOMINATE, IN THAT:

(A) MISSOURI LAW IS CONSTITUTIONALLY APPLIED TO ALL PLAINTIFFS' BREACH OF CONTRACT CLAIMS SINCE THERE IS NO VARIATION IN THE SISTER STATES' CONTRACT LAWS REQUIRING THEIR APPLICATION, INCLUDING STATE INSURANCE REGULATIONS THAT DO NOT AUTHORIZE USE OF CATEGORICALLY INFERIOR "NON-OEM" REPLACEMENT PARTS, AND THUS NO OTHER STATES' SOVEREIGNTY OR JURISPRUDENCE IS THREATENED;

(B) THE OVERRIDING COMMON BREACH OF CONTRACT ISSUE, EITHER ALONE OR COMBINED WITH PROOF OF OTHER CLASS-WIDE COMMON ISSUES OF FACT AND LAW, JUSTIFIES THE TRIAL COURT'S DISCRETIONARY RULING UNDER RULE 52.08(B) THAT COMMON ISSUES PREDOMINATE;

(C) THE OTHER ALLEGED "VARIATIONS" AS TO CERTAIN AFFIRMATIVE DEFENSES LIKEWISE ARE NOT "TRUE CONFLICTS" REQUIRING APPLICATION OF ANOTHER STATE'S LAW AND DO NOT DEFEAT CLASS CERTIFICATION; AND

(D) THERE IS NO INDICATION IN THE ORDER OR OTHERWISE IN THE RECORD THAT THE TRIAL COURT INTENDS TO APPLY MISSOURI LAW TO NON-RESIDENT CLAIMS IF A "TRUE CONFLICT" EXISTS.

A. Summary of Argument

In this writ proceeding, American Family's primary contention is that the trial court applied "an unfounded choice of substantive law"[11] to arrive at the conclusion that common issues of law and fact predominate under Rule 52.08(b). American Family accuses the trial court of "mindlessly"[12] and unconstitutionally applying Missouri law to all issues in order to create common issues for purposes of certifying the class. But this is not what the trial court did, nor does a fair reading of the interlocutory class certification order merit such an attack. Nowhere in the order, or otherwise in the record, does the trial court proclaim that Missouri law applies to all legal issues that might arise in the case. Instead, the trial court concluded that class-wide common proof of American Family's liability,[13] including the uniform law applicable to the breach of contract claim, justified a finding that common issues predominate. This discretionary ruling was made after due consideration of extensive written briefs and after weighing the facts and law

[11] *See* Point Relied On I, at p. 26 of American Family's brief.

[12] *See* p. 55 of American Family's brief ("[T]he certification order adopts plaintiffs' mindless invitation to apply Missouri law to everything.")

[13] *See*, *e.g.*, charts listing "Common Facts" and "Common Legal Issues" presented at the class certification hearing, attached as Exhibits 5 and 4 to plaintiffs' Answer to Writ.

presented at an eight-day evidentiary hearing where both sides submitted live testimony and legal argument.

Contrary to American Family's contentions, the trial court is permitted to apply Missouri law to the overriding common legal issue—and count it as one of many "common issues" for purposes of class certification—because the elements of a claim for breach of contract do not differ materially between the 14 states at issue. This is constitutionally permitted by American Family's primary authority *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 816 (1985), even where there is no nexus between the forum and non-resident plaintiffs. *Shutts* states that constitutional limitations on choice of law cannot be violated where there is no material variation between other potentially applicable law. *Id.* ("We must first determine whether Kansas law conflicts in any material way with any other law which could apply. There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit."). This is consistent with Missouri jurisprudence holding that a choice of law determination is not necessary where the laws are the same. *See Reis v. Peabody Oil Co*., 997 S.W.2d 49, 59 (Mo. App. 1999)(citing *Hartford Accident and Indemnity Co. v. Travelers Ins. Co.*, 525 S.W.2d 612, 616 (Mo. App. 1975).

At the class certification hearing, plaintiffs demonstrated that there is no material variation between the elements of a breach of contract claim in each of the 14 states at

issue.[14] Thus, the same MAI instruction would be used to submit all of plaintiffs' claims at trial whether "applying" Missouri, Wisconsin or one of the other states' laws. *See, e.g., Hicks v. Graves*, 707 S.W.2d 439, 445-446 (Mo. App. 1986)(MAI properly used to submit substantive law of other states). The trial court did not abuse its discretion or exceed its authority by "counting" this as a common issue. Since it is substantially the same as other states' laws, Missouri law is fairly and constitutionally applied to this overriding issue of law.

More importantly, the class certification order does not apply any unique Missouri law "extra-territorially" to the claims of non-resident plaintiffs nor does it usurp the sovereignty of Missouri's sister states. On this issue, American Family contends that alleged variations in the insurance regulatory schemes of the other states, the statute of limitations, the collateral source rule, and its insertion in some policies of an appraisal clause preclude application of Missouri law to the claims of non-resident plaintiffs. Only one of these alleged "variations" relates to an element of breach of contract. That is, American Family says that because state regulations permit and sometimes even encourage use of non-OEM parts to promote competitive pricing, its uniform practice of paying for cheaper non-OEM parts is governed by those state regulations and Missouri law may not be applied to establish the breach element of non-resident plaintiffs' claims.

[14] *See, e.g.*, chart identifying elements of claim in each state attached as Exhibit 2 to class plaintiffs' Answer to Writ; *see also* Answer, Exh. 1, Vol. VIII, at 1581-1592.

This argument ignores plaintiffs' primary contention that non-OEM parts are categorically inferior and uncontested proof that no state's insurance regulations permit use of *inferior* aftermarket replacement parts. Similarly, no regulator has considered the quality of aftermarket parts in adopting the various regulations. *See, e.g.,* affidavit of Jay Angoff, former Director of the Missouri Department of Insurance, plaintiffs' appendix, A199-A210, at ¶ 3(a-f).[15] American Family does not contend, let alone establish, that any state permits use of inferior non-OEM replacement parts. Therefore, no state regulation cited by American Family would preclude a claim for breach of contract based on payment for non-OEM replacement parts where those parts are inferior and defective as plaintiffs contend here. The alleged "variations" in state regulations cannot defeat certification because they (i) are not a "true conflict" under *Shutts*, (ii) do not require application of foreign law to establish whether a breach occurred, and (iii) do not eliminate the overriding "common issue of law" – the uniformity in the elements establishing a breach of contract claim.

The three remaining alleged "variations" are at most affirmative defenses, and do not preclude certification. Two of the alleged "variations"—collateral source and appraisal—do not apply and cannot inject a "true conflict" preventing application of Missouri law to the breach of contract claim. Moreover, even if a conflict did exist as to

[15] Notably, neither the amicus brief submitted by the NAIC or by the Ohio Insurance Commissioner state that any state regulations permit use of inferior non-OEM replacement parts.

these affirmative defenses such that another state's law might apply to a particular issue (such as statute of limitations), that would not defeat class certification because—as Judge Clark determined—the other common issues of fact and law still predominate.

The preliminary writ in prohibition entered by this Court should not be made permanent because the trial court properly exercised its discretion to weigh all the facts and the law, concluding that each element of Rule 52.08 was satisfied.

B. Standard of review: A writ of prohibition is not appropriate to review the trial court's discretionary ruling that common issues of fact and law predominate under Rule 52.08 when that ruling may be readily challenged on appeal.

This extraordinary writ proceeding is an original action reviewing the propriety of an interlocutory class certification order, and in particular, American Family's assertion that the order violates the Due Process and Full Faith and Credit clauses of the U.S. Constitution by applying Missouri law to the claims of non-resident plaintiffs. American Family fails to state the applicable standard of review in its brief as required by Rule 84.04(e).

1. Interlocutory review of alleged trial court error by writ is reserved for rare and "extraordinary circumstances."

Rule 84.22(a) provides: "No original remedial writ shall be issued by an appellate court in any case wherein adequate relief can be afforded by an appeal . . .." *See also State ex rel K-Mart Corp. v. Holliger,* 986 S.W.2d 165, 169 (Mo. banc 1999)("A

remedial writ is not an appropriate remedy to resolve issues which may be addressed through appeal."). This Court has identified three narrow situations in which writs of prohibition may issue, including: (1) to prevent an usurpation of judicial power because the trial court lacks either personal or subject matter jurisdiction; (2) to remedy a clear excess of jurisdiction or an abuse of discretion such that the lower court lacks the power to act as contemplated; and (3) to prevent some absolute irreparable harm that may come to a litigant "when there is an important question of law decided erroneously that would otherwise escape review by this Court, and the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo.banc 1994). Interlocutory review of trial court error by writ of prohibition "should only occur in extraordinary circumstances." *Id*.

American Family's constitutional challenge to the class certification order falls under the second category.[16] American Family contends that the trial court exceeded its jurisdiction or abused its discretion to the point of exceeding its jurisdiction by ruling that

[16] American Family asserted in its writ petition that the "immense pressure to settle" following class certification effectively eliminated a defendant's right to appeal a class certification order and implied that this created hardship and expense. *See* Writ Petition at ¶ 34. However, American Family does not rely on this third category as a basis for relief in its brief nor has it made any showing of "hardship or expense." Thus, this argument is waived and cannot be a proper basis for a writ of prohibition.

common issues of fact and law predominate under Rule 52.08(b). American Family thus argues only that Judge Clark abused his discretion in ruling in favor of plaintiffs on class certification—the very type of argument that should be addressed, if at all, on direct appeal.

Whether the elements of Rule 52.08, including predominance, have been satisfied is ordinarily an issue "which must first be determined by the trial court and which we [the appellate court] will review under an abuse of discretion standard following final resolution of the issues below." *State ex rel Byrd v. Chadwick*, 956 S.W.2d 369, 376 (Mo. App. 1997), citing *Ralph v. American Family Mut. Ins. Co.*, 835 S.W.2d 522, 523 (Mo. App. 1992) (emphasis added). A trial court has "wide discretion" as to whether the case should proceed as a class action. *Grosser v. Kandel-Iken Builders, Inc*., 647 S.W.2d 911, 918 (Mo. App. 1983).

Review of a discretionary matter like class certification by way of an extraordinary writ is much narrower than the review permitted on direct appeal. "The general rule is that, if a court is entitled to exercise discretion in the matter before it, a writ of prohibition cannot prevent or control the manner of its exercise, so long as the exercise is within the jurisdiction of the court." *State ex rel K-Mart Corp,* 986 S.W.2d at 169. "[T]he discretionary nature of the trial court's order portends that a writ rarely will be granted." *Id.* It is only where the abuse of discretion "is so great as to be an act in excess of jurisdiction and is such as to create injury which cannot be remedied on appeal, [that] prohibition may be appropriate." *Id*.

There are only two Missouri cases that we have located reviewing a class certification order by way of a writ. Neither of these cases vacated a class certification order entered by the trial court. Instead, the respective trial courts were allowed to exercise their discretion to determine if the elements of Rule 52.08 were met and the defendants' challenge on that issue was reserved for appeal. *See State ex rel. Byrd,* 956 S.W.2d at 376. Notably, the *Byrd* court cautioned that its role is not to tell the trial court **how** to exercise its discretion, but only to "direct it as to what determinations it must make, and then allow it to make those determinations following issuance" of the writ. *Id.* at 376. "Whether those determinations ultimately prove to be correct will, of course, be before [the Appellate Court] if the case is appealed following final resolution of the issues in the trial court." *Id.* "Any error committed by the trial court in certifying the class. . .**can be corrected on appeal**." *Byrd*, 956 S.W.2d at 376. (emphasis added).[17]

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[8]It should be noted that *Byrd* involved two novel questions under Missouri law: (1) whether the elements of Rule 52.08 (a) and (b) must be satisfied in order to certify a "preliminary settlement class", and (2) <u>when</u> the trial court must make the determination that the elements are satisfied (either before the temporary class is certified or at the "fairness" hearing). *Byrd*, 376 S.W.2d at 380. The Court held that the class elements must pass a "probable cause" test before the trial court may certify a preliminary settlement class. *Id.* at 382-83. The preliminary writ of mandamus was made absolute because the trial court had a duty but failed to make these findings and the record did not show that it planned to do so at a later date. *Id.* at 388-89.

In the second case, *State of Missouri ex rel. Leader Motors v. Koehr*, 1992 WL 151844 at *4 (Mo. App. 1992), the Court of Appeals entered a writ of prohibition finding the class did not meet Rule 52.08 criteria. But this Court summarily quashed the writ, presumably agreeing with the intermediate court's dissenting view that discretionary rulings were not the proper subject of a writ. As the dissent further emphasized, if there is an error to be made, it should be in favor of maintaining a class action, because a class certification order is always subject to later modification should that be necessary. 1992 WL 151844 at *4 (quoting *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968)).

To justify issuance of a permanent writ of prohibition here, American Family must show that the trial court abused its discretion to the point of exceeding its jurisdiction so as to "create an injury which cannot be remedied on appeal." *State ex rel. K-Mart*, 986 S.W.2d at 169. The discretionary ruling that "common issues of law and fact predominate" does not meet this criteria.

C. After "rigorous analysis," the trial court entered the class certification order expressly finding that each element of Rule 52.08 is satisfied as required by Missouri law.

A key aspect of American Family's constitutional challenge—and the basis for invoking this Court's writ power—is the incorrect assertion that the class certification order indicates that the trial court intends to apply Missouri law to every issue in the case and to every plaintiffs' claim, whether or not there is a variation requiring application of another state's law to a particular issue. American Family argues that this was the sole

basis for the trial court's ruling that common issues predominate and that applying the alleged conflicting laws of other states "drains the certification order of any assumed predominance of questions of law or fact." *See* American Family's brief at p. 56. For this reason, it is important to determine what the class certification order does and does not do.

1. As required by Missouri law, the class certification order contains express findings that each element of Rule 52.08 are satisfied.

There is no question that the trial court made the required findings in the class certification order and that all of the arguments and evidence presented by both sides was carefully considered.[18] In accordance with Missouri law, the class certification order identifies the class certified and explicitly finds that it satisfies each and every requirement of Rule 52.08 (a) and (b), including a finding that common issues of law and fact predominate over questions affecting only individual class members. *See* Class Certification Order, Exh. B to Petition for Writ. The order does not state that Missouri law will be applied to all issues and to all plaintiffs' claims whether or not there are variations requiring application of another state's law to a particular issue.

[18] In a letter to the parties, Judge Clark himself notes the extensive deliberations he conducted: "As all are aware, my [class certification] decision required much more deliberation than I originally projected." *See* Ex. M to American Family's Petition for Writ filed in the Missouri Court of Appeals (submitted to this Court on cd-rom).

Despite this, American Family states that "the certification order adopts plaintiffs' mindless invitation to apply Missouri law to everything." *See* American Family's brief at p. 55. The sole support for this argument is not any language from the order, but a citation to three isolated pages in the hearing transcript. The discussion cited is from class plaintiffs' opening argument identifying one of many common legal and factual issues. Focusing on the one legal issue cited by American Family, counsel for class plaintiffs argued that Missouri law is fairly and constitutionally applied to the common claim that paying for cheaper non-OEM replacement crash parts constitutes a breach of American Family's contractual obligations because the elements of breach of contract do not vary among the states at issue. *See* Answer, Exh., Answer, Vol. I at pp. 103-110. A chart with citations to supporting cases from each of the relevant states was presented to the court. *Id.* at 104. Notably, class counsel further argued that both *Shutts* and Missouri choice of law rules permitted application of forum law when there is no conflict, citing the relevant language from *Shutts* and even providing the Court a copy of the case.[19] The trial court specifically inquired about the relevance of the choice of law and understood how that fit into the analysis of predominance under the rule:

> THE COURT: Why would I be interested in choice of law?
>
> MR. PINTAR: Well, Your Honor, the point, the point here is that you can apply one state's law to all class members and it shows a common legal standard which, again, is another indicia of the predominance of legal issues.

[19] This issue is fully briefed in section D, *infra.*

THE COURT: Oh, I see.

Id. at 105-106.

Class counsel further explained that even if American Family were to establish variation among the breach of contract laws (which it cannot, see section D, infra), application of other states' laws to that issue would not defeat predominance in this case because of the existence of other class-wide common proof on other factual and legal issues. *Id.* at 108-110. *See also, e.g.,* Answer, Exhs. 3-5 (charts identifying other common issues of law and fact); and further discussion of this issue at the conclusion of the hearing at Answer, Exh. 1, Vol. III, at p. 1581-1592.

Finally, before moving on to a discussion about the next element under Rule 52.08, class counsel specifically noted that the trial court has "the right to establish manageable subclasses or to otherwise modify the class and that's very important, because the case is not static. We've taken some discovery, we haven't completed discovery. . .And as the case develops, there may be a need to either modify the class or develop sub-classes." *Id*. at 113-114. While not necessary, the trial court expressly ruled that the order "remains subject to modification, correction, restriction and/or amendment as further information is provided." *See* Petition, Exh. B (Order) at ¶ 7.

Based on this discussion, it is unfair at best to accuse the trial court of accepting a "mindless invitation to apply Missouri law to everything." And, importantly, unfair to conclude that the sole basis for the trial court's ruling as to predominance was this overriding common issue of law (although it might satisfy predominance by itself).

2. There is no requirement that a Missouri trial court issue findings of fact and conclusions of law as part of a class certification order and, instead, the order is entitled to all favorable inferences.

American Family also complains that the trial court's order containing a "bare recitation of the certification elements" is proof that no rigorous analysis of the facts and law was done to establish the predominance element. *See* American Family's brief at p. 64. Apparently, American Family wants to "federalize" Missouri class action law and require a formal opinion detailing the facts, law and analysis supporting a class certification order. But there is nothing in Rule 52.08 requiring that to be done, and nothing in the general rule governing entry of orders either. *See* Rule 74.02. A Missouri trial judge is only required to issue "a brief opinion containing a statement of the grounds for its decision" (i.e. findings of fact and conclusions of law) upon specific request of a party at trial in a court-tried case. *See* Rule 73.01. Even if this rule applied to interlocutory class certification orders, American Family did not request that the trial court issue "findings of fact or conclusions of law" as they now suggest should have been done.

Importantly, where no findings of fact and conclusions of law are requested or entered, "all fact issues are to be considered found in accordance with the result reached." *Underwood v. Hash*, 67 S.W.3d 770, 774 (Mo. App. 2002). And, the "judgment is to be upheld on any reasonable theory within the pleadings and supported by the evidence." *Id*. Moreover, in a court-tried case, "all evidence favorable to the judgment and all

inferences to be drawn from the evidence are accepted as true, and all contradictory evidence is disregarded." *Id.* The interlocutory class certification order deserves the same deference. For example, evidence that liability can be determined on a classwide basis – *i.e.* that plaintiffs can establish at trial that non-OEM crash parts are categorically inferior to OEM parts because of industry-wide flawed design, manufacturing and quality control processes must be accepted as true; evidence that American Family automatically specifies non-OEM crash parts in estimates must be accepted as true; and evidence that American Family does not consider pre-loss or post-repair condition in its decision whether to use a non-OEM crash part in computing its estimates must be accepted as true.

On class certification, the trial court is entitled to consider the evidence submitted relating to potential variations (such as the statutes of limitation), weigh them against evidence of other common issues of law and fact and determine whether common issues still predominate. Considering the favorable evidence and inferences drawn from the evidence, it is clear that the trial court here did not rule that Missouri law would be applied to all issues, even if variations are demonstrated. Rather, it ruled that even when the potential variations raised by American Family are considered, common issues of fact and law still predominate. This is a discretionary determination not properly subject to interlocutory review by way of a writ, but must await appellate review under an abuse of discretion standard at the end of the case. *See Byrd, supra.*

D. *Shutts* permits application of Missouri law to the elements of all plaintiffs' breach of contract claims because there is no material variation between the states. Thus, this overriding class-wide issue may be "counted" as a common issue.

American Family complains that the class certification order violates the Due Process and Full Faith and Credit Clauses of the U.S. Constitution because it arbitrarily applies unique Missouri law to the claims of non-resident plaintiffs in "extra-territorial fashion," usurping the sovereignty of Missouri's sister states. First, American Family argues that the lack of any nexus between Missouri and non-resident plaintiffs automatically precludes application of forum law to non-resident claims. Second, American Family argues that alleged variations in the applicable states' insurance regulatory schemes require the trial court to engage in a choice of law analysis that would preclude application of Missouri law to the claims of non-resident plaintiffs. Because the existence of a true conflict between the states' laws is required to establish any constitutional harm in the first instance, American Family's arguments are both without merit.

1. A "true conflict" is required under *Shutts* and Missouri choice of law rules before engaging in a choice of law analysis.

Contrary to American Family's contentions, the trial court is permitted to apply Missouri contract law—and count the breach of contract issue as one of many "common issues" for purposes of class certification—because the elements of a claim for breach of

contract do not differ materially between the 14 states at issue. This is constitutionally permitted by *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 816 (1985), even where there is no nexus between the forum and non-resident plaintiffs. Although relying upon *Shutts*, American Family has consistently ignored controlling language stating that constitutional limitations on choice of law cannot be violated where there is no material variation between other potentially applicable law. *Id.*

In *Shutts*, the Kansas Supreme Court applied Kansas contract and equity law to the claims of all plaintiffs and used those common issues of law as "an added weight in the scale" to certify a nationwide class. *Id.* at 815-816, 821.[20] As here, the defendant asserted that "total application of Kansas substantive law" violated the Due Process and Full Faith and Credit Clauses of the U.S. Constitution. *Id*. at 816. Significantly, the U.S. Supreme Court ruled that before any constitutional violation can be established, a material variation or conflict between other potentially applicable law must exist. *Id.* ("We must first determine whether Kansas law conflicts in any material way with any other law which could apply. There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit.").

Ultimately, the U.S. Supreme Court affirmed that part of the judgment in which the Kansas Supreme Court held that it had jurisdiction over non-resident class plaintiffs and remanded the case for further proceedings. *Id.* at 823. Upon remand, the Kansas

[20] *Shutts* was on review after final judgment rather than an interlocutory review of class certification.

Supreme Court analyzed each state law at issue to determine if there was a conflict. The Kansas Supreme Court concluded that the laws of the other states presented a "false conflict," and affirmed the lower court's judgment in favor of the class. *Shutts v. Phillips Petroleum Co.*, 240 Kan. 764, 767-768, 800-802, 732 P.2d 1286 (1987). (noting the U.S. Supreme Court's direction that "if the law of Kansas was not in conflict with any of the other jurisdictions connected with the suit, then there would be no injury in applying the law of Kansas.").

Other cases confirm the *Shutts* rule that forum law may be constitutionally applied where no variation among relevant laws exists. *See, e.g., Phillips v. Marist Soc'y,* 80 F.3d 274, 276 (8th Cir. 1996)("We agree with the statement of Judge Richard A. Posner that 'before entangling itself in messy issues of conflict of laws a court ought to satisfy itself that there actually is a difference between the relevant laws of the different states.'"); *Barron v. Ford Motor Co. of Canada LTD,* 965 F.2d 195, 197 (7th Cir. 1992)(same); *Dosanjh v. Bhatti,* 85 Wash. App. 769, 775-776, 934 P.2d 1210, 1213 (1997). If there is no conflict, the law of the forum may be applied. *In re Disaster at Detroit Metro. Airport*, 750 F.Supp. 793, 796 (E.D. Mich. 1989).

The *Shutts* rule is also consistent with Missouri jurisprudence holding that a choice of law determination is not necessary where the laws are the same. *See Reis v. Peabody Oil Co.*, 997 S.W.2d 49, 59 (Mo. App. 1999)(citing *Hartford Accident and Indemnity Co. v. Travelers Ins. Co*., 525 S.W.2d 612, 616 (Mo. App. 1975)).

At the class certification hearing, plaintiffs demonstrated that there is no material variation between the elements of a breach of contract claim in each of the 14 states at issue. That is, the basic elements in a breach of contract action are the same: (1) the existence of a contract, (2) performance by the plaintiff, (3) breach by the defendant, and (4) damage. *See, e.g.,* MAI 26.06; and Answer at Exhibit 2 (chart identifying elements of breach of contract claim in each state). Thus, the same MAI instruction would be used to submit all the plaintiffs' claims at trial whether "applying" Missouri, Wisconsin or one of the other states' laws. *See, e.g., Hicks v. Graves,* 707 S.W.2d 439, 445-447 (Mo. App. 1986)(MAI properly used to submit substantive law of other states; error to use Kansas' P.I.K. instructions).

The trial court was particularly interested in the choice of law issue and specifically inquired at the end of the hearing (as he had during opening statements) whether the court has "authority to extend the class and the rulings of this court with effect beyond the borders of this state?" *See* Answer, Exhibit 1, Vol. VIII, at p. 1581. Following that question and an additional discussion of *Shutts*, the trial court asked how the claims would be applied under the MAI and confirmed that MAI 26.06 was consistent with the substantive law of all 14 states. *Id.* at 1581-1592.

Thus, the trial court did not abuse its discretion or exceed its authority by "counting" breach of contract as a common issue of law. Missouri law is fairly and constitutionally applied to determine whether American Family breached its standardized insurance policies by refusing to pay for OEM parts and necessary repairs.

2. The state insurance regulations do not raise a "true conflict."

American Family also contends that state regulations permitting the use of non-OEM parts to promote competitive pricing preclude application of Missouri law to the claims of non-resident plaintiffs.[21] This argument ignores plaintiffs' primary contention that non-OEM crash parts are categorically inferior and uncontested proof from American Family's own experts that no state insurance regulation permits the use of *inferior* non-OEM replacement parts. *See* Answer, Exh. 1, Vol. V at p. 1116 (testimony of Samuel Peltzman); and Vol. VI, at p. 1210 (testimony of Christopher Pflaum). Indeed, American Family failed to submit any evidence, and does not contend here, that any state permits the use of inferior non-OEM replacement parts.

In an almost identical imitation parts case, the court in *Avery v. State Farm Mutual Insurance Company*, 746 N.E.2d 1242, 1254 (Ill. App. 2001) *app. accepted*, __ N.E.2d __ (Ill. 2002) rejected the very same regulatory argument that American Family is making here. In doing so, the *Avery* court stated that:

[21] There is no evidence that the outcome of this case would impact American Family's "competitive position." While American Family argued at length that penalizing it for specifying cheaper inferior non-OEM parts would cause insurance premiums to rise, one of its two expert economists, Christopher Pflaum, testified that State Farm still has the lowest premiums even though it no longer specifies non-OEM crash parts following *Avery*. *See* Answer, Exh. 1, Vol. VI at p. 1200.

> "[f]ormer and current state representatives of state insurance commissioners testified that the laws in many of our sister states permit and in some cases encourage the use of non-OEM parts as an effort to encourage competitive price control. But each witness admitted unequivocally that his respective state would not sanction the use of *inferior* aftermarket replacement parts."

Id. (emphasis in original). Moreover, in permitting their use, regulators have made no determinations as to the quality of non-OEM parts. *See, e.g.*, plaintiffs' appendix at A199-A210 (Angoff Aff., at ¶ 3(d)). Significantly, neither the NAIC's nor Ohio Insurance Commissioner's amicus briefs contend that any state regulation permits the use of inferior non-OEM replacement parts, or that regulators have made determinations as to the quality of non-OEM parts.

Thus, the regulatory "variations" alleged by American Family do not bear upon whether American Family has breached its policy obligations and do not insulate it from liability. These alleged "variations" are not a "true conflict" under *Shutts*, do not require application of foreign law to determine if a breach occurred, and do not eliminate this overriding "common issue of law."

Notably, American Family does not raise any potential conflict with respect to the breach of contract claims for "omitted repairs." The United States Supreme Court has noted the propriety and constitutionality of requiring the party opposing application of forum law to a national class to bear the burden of demonstrating any conflicts of foreign law. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 733 n.4 (1988). Except for a potential

variation in the statute of limitations which would not defeat class certification (discussed in section E), class plaintiffs are unaware of any conflicting law potentially applicable to these claims. Accordingly, Missouri law is fairly and constitutionally applied to the "omitted repairs" class plaintiffs' breach of contract claims.[22]

E. <u>The remaining state law "variations" alleged by American Family either do not apply to this case or do not defeat class certification because the trial court properly concluded that other common issues still predominate</u>.

American Family asserts that variations in state law with regard to statutes of limitation, the collateral source rule, and application of American Family's appraisal clause raise individual issues that preclude class certification. In the trial court, the parties extensively argued the statute of limitations issue and the irrelevance of the collateral source rule. Judge Clark carefully considered those issues and properly decided that they did not present individual issues that overcome the many common issues of law and fact that predominate in this case and support class certification. American Family improperly raises the appraisal issue ***for the first time in its writ petitions***, and thus the Court could not have considered that issue below. However, even if American Family had raised the appraisal clause issue below, the clause does not apply to the facts of this case and does not make certification of the class improper.

[22] An "omitted repairs" class very similar to the one here was certified in *Skene v. State Farm*, No. CV 99-01053, Superior Court of Maricopa County, Arizona. *See* plaintiffs' appendix at A211-A215.

1. Variations in state law do not defeat predominance.

Plaintiffs do not seek to apply Missouri law to any affirmative defenses where there is a "true conflict" with the law of another state and did not submit these as "common issues" supporting class certification. Instead, plaintiffs appropriately argued that even if another state's law applies to one or more issues, class certification is not defeated. *See, e.g., In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,* 148 F.3d 283, 315 (3d Cir. 1998)(Courts have expressed a willingness to certify nationwide classes on the ground that relatively minor differences in state law could be overcome at trial by grouping similar state laws together and applying them as a unit. . ."). *See also* Class Plaintiffs' Answer, Exhibits 9 (demonstrating uniformity in case law holding that variances in affirmative defenses will not defeat class certification); and Exhibit 10 (demonstrating uniformity in case law holding that variances in statutes of limitation do not defeat class certification).

Rather, as Judge Clark did, the potential (although not yet determined) variations in the law applicable to particular affirmative defenses must be considered and weighed – all within the trial court's discretion – to determine if the "predominance" element is still satisfied. Judge Clark performed this analysis as to the issues American Family raised before him, and the class certification order expressly states that it "remains subject to modification, correction, restriction and/or amendment." *See* Exhibit 4. Thus, after determining the law applicable to particular issues (upon appropriate motion and at the appropriate time), Judge Clark provided a mechanism to re-evaluate whether common

issues of law or fact still predominate. Nonetheless, American Family invites this Court not only to substitute its findings for Judge Clark's, but also to consider additional potential conflicts it never raised below.

2. Variations in Statutes of Limitation do not defeat predominance.

The variation in different states' statutes of limitation for breach of contract actions was raised extensively in both the opening and the closing argument. In their opening, plaintiffs pointed out that statute of limitation differences are not outcome determinative variations sufficient to prevent class certification. *See* Answer, Exh. 1, Vol. I, at 106. After the parties' closing arguments, Judge Clark specifically raised the issue, and the parties argued its effect on class certification. *See id*., Vol. VIII at 1605-1610, 1614, 1629. Plaintiffs introduced a chart identifying controlling case law from all 14 states uniformly providing that statute of limitations differences do not defeat class certification. *See* Answer, Exh. 10. As plaintiffs discussed with the trial court below, differences in statutes of limitation are inherent in any multi-state class action. It is an issue that can and should be dealt with as part of a claim process after a trial on the merits. *See* Answer, Exh. 1, Vol. VIII, at 1606-07.[23]

[23]Mr. Pintar: [T]o the extent there are any differences in the statute of limitations. . . Those don't defeat predominance. Any, in fact, in any multi-state class action, you're going to have differences in the statute of limitations . . . . And, what you can do simply is, the claims for the folks in Wisconsin, let's say that's a six-year statute, those claims can go back six years. In Missouri, those claims can go back

American Family cannot in good faith argue that the trial court did not consider the statute of limitations issue. The court simply disagreed with American Family's contention that these variations predominated over the many common legal and factual questions at issue.

3. The collateral source rule is irrelevant

Due to the nature of American Family's performance under the specific terms of its own contract, the collateral source rule does not apply to the facts of this case. Thus, any variation in the application of the rule among the 14 states at issue is irrelevant.

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ten years. It's simply administratively working that out at the end of the day. That's – and again, we have authority on that. In fact, we have a board here. In each of the 14 states, you can see, we have authority that the statute of limitations do not defeat predominance. The courts have been through this. And, it's, again, it's just a simple fact of any multi-state class action. *See* Answer, Exh. 1, Vol. VIII, at 1606-07. It is for this reason that Missouri's borrowing statute though not raised by American Family before the trial court, is of no moment. Even if differing statutes of limitation are applied, class certification is not defeated.

As was emphasized repeatedly throughout the trial court proceedings,[24] by the terms of the contract it wrote, American Family has two choices when its insured has a claim. It can either: (1) repair the damaged vehicle; or (2) pay the loss in money.[25] *See* Answer, Exh. 6. American Family ***always*** chooses to pay the loss in money. This is true in all 14 states at issue. Once it elects to pay the loss in money, under the terms of its own contract, American Family has no control over what the insured ultimately does with the money. Darnell Moore, American Family's Executive Vice President, confirmed each of these essential points during his testimony before Judge Clark. *See* Answer, Exh. 1, Vol. IV, at 711-712, 715-716. Therefore, the only measure of American Family's performance is the amount of money it provides to indemnify its insured. If American Family's payment is less because it is based on the use of cheaper inferior non-OEM

[24]In fact, the point was emphasized so much, that Judge Clark even commented that "That's been repeatedly -- that's been repeatedly and repeatedly emphasized during these proceedings." *See* Answer, Exh. 1, Vol. IV, at 805.

[25] As American Family Physical Damage Staff Administrator Mike Canney explained to the court: "[W]e aren't in the business of repairing vehicles. We are in the business of paying money to repair the vehicles." *See* Answer, Exh. 1, Vol. IV, at 805.

parts, it has breached its contract and damaged its insured. What happens after American Family's performance is irrelevant.[26]

Even if the collateral source rule were relevant, American Family acknowledges that, "none of the states, except Illinois in the still-pending *Avery* case [which decided in plaintiffs' favor] have addressed the application of the collateral source rule" to this set of facts. Petition at 43-44. Nonetheless, contrary to its representation that it was "prevented from arguing" this issue (*id.*), American Family raised state variations in the collateral source rule before Judge Clark. He considered the issue and properly found that the many common issues of law and fact predominated under Rule 52.08(b)(3).

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[26] While American Family makes much ado about the "pre-loss condition" of its insureds' vehicles being the main issue in its contractual duty, in fact at the trial court, plaintiffs proved that the pre-loss condition of the vehicle was not even considered in American Family's decision to use an imitation crash part:

> Mr. Bunch: And, secondly, Your Honor, perhaps more importantly it relates to the issue of pre-loss condition. Because when they write an estimate and put down the non-OEM part, they don't make any note on their repair estimates about the pre-loss condition of the vehicle. Do they, Mr. Canney?
>
> Mr. Canney: We do not mention pre-loss condition on the estimate.

See Answer, Exh. 1, Vol. IV, at 806-807.

4. The Appraisal Clause issue does not defeat class certification.

American Family raises a third potential conflict among state laws by asserting that in some states, it has included an appraisal clause in its standardized contracts. American Family failed to raise this issue in its 72-page Opposition Brief or the extensive live testimony before the trial court. Yet, it argues that Judge Clark so abused his discretion by not considering the issue that an extraordinary writ must issue from the Supreme Court to remedy the fault. By this reasoning, American Family would turn this Court and the appellate courts of Missouri into courts of original jurisdiction on all potential class certification issues via interlocutory writ. Issues that American Family did not bring to the attention of the trial court should be considered waived as to this writ proceeding. *See State ex rel. Nixon v. American Tobacco Co., Inc*., 34 S.W.3d 122, 129 (Mo. banc 2000) ("An issue that was never presented to or decided by the trial court is not preserved for appellate review.").

If plaintiffs had had the opportunity to address the issue below, they would have prevailed because American Family's appraisal clause does not apply to the facts of this case. American Family cannot compel appraisal because the dispute does not fall within the scope of the clause.[27] Under the terms of the clause, an appraiser is empowered ***only*** to "state separately the actual cash value and the amount of the loss." Realtor's Brief at 40-41. He or she is not empowered to determine the relative quality of the parts used in determining payment or to interpret American Family's obligations under its policy. *See Lundy v. Farmers Group, Inc.*, 750 N.E.2d 314, 319 (Ill. App. 2001), c*ert. den.* 763 N.E.2d 319 (Ill.

[27]*See Heinig v. Hudman*, 865 P.2d 110, 116 (Ariz. App. 1993) (arbitrator's authority is limited to those areas agreed to be arbitrated); *Ringwelski v. Pederson*, 919 P.2d 957, 958 (Colo. App. 1996) (same); *Clark v. Country Mutual Ins. Co.*, 476 N.E.2d 4,7 (Ill. App. 1985) (same); *North Miami Education Ass'n v. North Miami Community Schools*, 736 N.E.2d 749, 757 (Ind. App. 2000) (same); *State v. Thomas Construction Co., Inc.*, 655 P.2d 471, 474 (Kan. App. 1982) (same); *Manson v. Dain Bosworth, Inc.*, 623 N.W.2d 610, 612 (Minn. App. 1998) (same); *Ohio Federation of State, County and Municipal Employees, Ohio Council 8, Local 3536 v. Clermont County Dept. of Human Serv.*, 678 N.E.2d 998, 1000 (Ohio App. 1996) (same); *Sloan v. Journal Publishing Co.*, 324 P.2d 449, 468 (Or. 1958) (same); *Azcon Construction Co., Inc. v. Golden Hills Resort, Inc.*, 498 N.W.2d 630, 633 (S.D. 1993) (same); *Scholl v. Lundberg*, 504 N.W.2d 115, 117 (Wis. App. 1993) (same).

2001) (substantially the same appraisal clause did not apply to imitation parts case).

The *Lundy* case is particularly instructive. There, as here, plaintiff alleged that defendant breached its policy contracts by specifying inferior non-OEM parts to repair its insureds' vehicles. Farmers brought an interlocutory appeal challenging the trial court's denial of its motion to stay or dismiss the action pending appraisal. The court rejected Farmers argument that the case was simply a dispute over the "amount of the loss." The court dismissed this characterization saying that it "oversimplifies the issues raised in the complaint." *Id.* at 319. The court instead properly characterized the imitation crash parts issue as a question of the interpretation of the insurer's obligations under its policy. *Id*.

The evidence presented by both parties at the class certification hearing lends credence to the *Lundy* court's findings. Both sides presented testimony relating to the interpretation of American Family's policy language. Both sides also presented extensive testimony from highly-trained experts in the automotive design and manufacturing industry to opine on the crash parts manufacturing process and the relative quality control standards of the original equipment and non-OEM manufacturers. Clearly, these issues are well beyond the capabilities of mere "appraisers" in the kind of summary procedure outlined in American

Family's policy. *See id*. ("These issues cannot be resolved through the appraisal process.").[28]

Even if the appraisal clause did apply to the facts at issue here, which it does not, American Family has waived its right to demand appraisal. American Family waited to raise the appraisal issue until ***September 9, 2002***, approximately ***two years*** after this case was filed, ***eight months*** after Judge Clark's certified the plaintiffs' class, and ***over three months*** after the Court of Appeals denied American Family's Writ petition. As such, it waived whatever right it may have had to demand appraisal. *See Lundy*, 750 N.E.2d at 319-20 (Farmers waived its right to appraisal by waiting to raise the issue until "years after it paid plaintiff's claim and 10 months after plaintiff filed suit," and after filing and losing two

[28]*See also Jefferson Ins. Co. of N.Y. v. Superior Court*, 475 P.2d 880, 883 (Cal. 1970) ("The function of appraisers is to determine the amount of damage resulting to various items submitted for their consideration. It is certainly not their function to resolve questions of coverage and interpret provisions of the policy."); *St. Paul Fire & Marine Ins. Co. v. Wright*, 629 P.2d 1202, 1203 (Nev. 1981) (trial court correctly determined that umpire and appraisers exceeded the scope of powers by interpreting coverage provisions); *Wells v. American States Preferred Ins. Co.*, 919 S.W.2d 679, 684 (Tex. App. 1996) ("weight of authority ... follows the rule that appraisers have no power or authority to determine questions of causation, coverage or liability....").

motions to dismiss and serving plaintiff with discovery. "Farmers' failure to invoke the appraisal clause in a timely manner caused unnecessary delay and expense for both parties.").[29]

Further, even if the appraisal clause could be applied to these facts, it should not operate to preclude class certification. This issue was discussed at length by the California Supreme Court in its well reasoned opinion in *Keating v. Superior Court*, 645 P.2d 1192, 1205 (Cal. 1982), *reversed in part on other grounds in Southland Corp. v. Keating*, 465 U.S. 1 (1984). *Id.* The *Keating* court noted that arbitration proceedings may well provide certain advantages through savings of time and expense; but it is doubtful that such advantages could compensate for the unfairness inherent in forcing hundreds, or perhaps thousands,

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[29] *See also Matter of Noel R. Shahan Irrevocable Trust & Intervivos Trust*, 932 P.2d 1345, 1348 (Ariz. App. 1996) (arbitration clauses are subject to waiver defense); *Peterman v. State Farm Mut. Auto. Ins. Co.*, 961 P.2d 487, 493 (Colo. 1998) (same); *Kilkenny v. Mitchell Hurst Jacobs & Dick*, 733 N.E.2d 984, 986 (Ind. App. 2000) (same); *Wesley Retirement Services, Inc. v. Hansen Lind Meyer, Inc.*, 594 N.W.2d 22, 30 (Iowa 1999) (same); *D. M. Ward Construction Co., Inc. v. Electric Corp. of Kansas City,* 803 P.2d 593, 596 (Kan. App. 1990) (same); *Ferdie v. Mid-Century Ins. Co.*, 631 N.W.2d 815, 819 (Minn. App. 2001) (same); *Griffith v. Linton,* 721 N.E.2d 146, 149 (Ohio App. 1998) (same); *Tjeerdsma v. Global Steel Bldgs., Inc*., 466 N.W.2d 643, 645 (S.D. 1991) (same).

of individuals asserting claims involving common issues of fact and law to litigate them in separate proceedings against a party with vastly superior resources. *Id.* The effect would be to place upon the parties, and the courts, many of the burdens which the class action device was designed to avoid. *Id.* The *Keating* court concluded that class-wide arbitration was appropriate because: (1) the parties would be the same, *i.e.*, the Class versus the defendant; (2) the agreements contained substantially the same arbitration clause; and (3) any class member who was dissatisfied with the class representative, the arbitrator or any other aspect of the class-wide arbitration, could opt of the class and proceed on his own. *Id.* at 1208. In light of the alternative of forcing hundreds of individuals to arbitrate separately, the Court found the class-wide arbitration to be a "better, more efficient, and fairer solution." *Id.* at 1209.

Similarly, in *Carnegie v. H&R Block, Inc.*, 687 N.Y.S.2d 528, 533 (N.Y. 1999), the court held that an arbitration clause will not operate to preclude class members' participation in a class action unless those members, after receiving notice concerning pendency of class action and choice as to arbitration, elected to opt out of the class. *See also Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa.Super. 1991), *app. den.* 616 A.2d 989 (Pa. 1992) (special characteristics of arbitration need not to preclude class certification); *Seagraves v. Urstadt Property Co., Inc.*, 1996 WL 159626, *6, *8 (Del.Ch.1996) (refusingto dismiss the class action and force the plaintiff to appraisal as an exclusive remedy because all issues could not be resolved through the appraisal process).

Finally, whether the appraisal clause is applicable to the facts of this case and whether American Family can assert it against waiver or unconscionability[30] defenses present common issues of law and fact, even if some variations of state laws exist. The common issues still predominate.

F. Multi-state classes are "routinely" certified where common issues of fact or law predominate.

Judge Clark's Order certifying a multi-state class in this case is far from novel. A number of courts have certified similar classes besides the court in *Avery, supra. See, e.g., Sims v. Allstate,* No. 99-L-393A, Twentieth Judicial Circuit, St. Clair County, Illinois (diminished value class); *Peterson v. State Farm*

[30] Requiring each insured to retain experts on the design, manufacturing, production and quality control procedures used by OEM and imitation crash parts manufacturers such as those who testified for both parties at the class certification hearing before Judge Clark is clearly one-sided and oppressive and thus unconscionable. *See Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 686-87(1996) (recognized contract defenses such as unconscionability can void enforcement of an arbitration clause). At best, at issue for each insured is a few hundred dollars. American Family, on the other hand, saved over $9 million by using imitation parts in one year alone. *See* Answer, Exh. 1, Vol. I, at 77. There is no evidence, however, that any of that savings is passed along to consumers in the form of lower premiums. *See* Answer, Exh. 1, Vol. VI, at 1199-1200.

Mut. Auto. Ins. Co., No. 99-L-394A (Ill. Cir. Ct., St. Clair County) (same); *Busani v. United Services Automobile Assn.*, No. 70816-9, Supreme Court of Washington (same). In fact, on March 13, 2002, a Pennsylvania state court, following *Avery*, certified a non-OEM parts class, relying on much of the same evidence presented here, including a declaration from Paul Griglio, one of the experts who testified before Judge Clark. *See Foultz v. Erie*, No. 3053 (Pa. Ct. C.P., Philadelphia County, March 13, 2002).[31]

Likewise, multi-state classes are not the constitutional oddity American Family conveys. State courts "routinely certify multi-state or nationwide classes in instances where common questions of law or fact predominate over those affecting only individuals. . .". *Taylor v. American Bankers Insurance Group, Inc.*, 267 A.D.2d 178, 178, 700 N.Y.2d 458, 459 (1999)(multi-state class certification affirmed where common practice of defendant-insurer in offering credit insurance coverage while routinely rejecting such claims was predominate issue). *See also Hi-Lo Auto Supply, L.P. v. Beretsky*, 986 S.W.2d 382 (Tx. App. 1999)(multi-state class asserting common scheme by auto parts supplier in selling "old" or "used" batteries as "new" in all its stores was proper despite potential variances in state laws); and *Avery v. State Farm Mutual Insurance Co.*, 746

[31] These class certification orders are included in plaintiffs' appendix for the Court's convenient reference at A216 to A293.

N.E.2d 1242 (Ill. App. 2001)(multi-state class upheld in similar non-OEM crash parts case).

G. A final choice of law ruling is not part of the class certification order, is not required and was not requested by American Family.

As noted above, a final choice of law ruling is not part of the class certification order, nor is one required at the class certification stage. *See In re Marion Merrell Dow Sec. Litig.*, [1994-1995 Transfer Binder] Fed. Sec. L. Rep. (CCH) 98356, 1994 U.S. Dist. LEXIS 10053, at *25 (W.D. Mo. July 18, 1994)("This is consistent with other courts which decline to make a choice of law determination at the class certification stage."); *In re Kirschner Med. Corp. Sec. Litig.* 139 F.R.D. 74, 84 (D.Md. 1991)(recognizing that "many courts have found it inappropriate to decide choice of law issues incident to a motion for class certification"); *Hi-Lo Auto Supply, L.P.*, 986 S.W.2d at 387 (". . . Hi-Lo's speculation regarding variance in the laws of Texas, Louisiana, and California is premature, as the trial court has not yet made a choice-of-law decision and may modify the class should such issues ultimately be found to predominate." Thus, multi-state class was properly certified where Hi-Lo engaged in a common scheme as to all class members.). Significantly, while American Family's constitutional challenge now (as well as at the class certification hearing) rests on the contention that Missouri law has been incorrectly applied to all issues in violation of *Shutts*, American Family never requested that the trial court make a final written choice of law determination.

Judge Clark carefully considered and weighed the potential (although not yet determined) variations in the law applicable to particular affirmative defenses – all within the trial court's discretion – to determine if the "predominance" element is satisfied. He performed this analysis as to the issues American Family raised, and the class certification order expressly states that it "remains subject to modification, correction, restriction and/or amendment." *See* Petition, Exh. B. Thus, after determining the law applicable to particular issues (upon appropriate motion and at the appropriate time), the trial court properly reserved the discretion to re-evaluate whether common issues of law or fact continue to predominate.

American Family has failed to demonstrate the necessary abuse of discretion, much less an abuse "so great as to be an act in excess of jurisdiction and is such as to create injury which cannot be remedied on appeal." *See State ex rel. K-Mart*, 986 S.W.2d at 169. The class was properly certified, Point I should be denied, and the preliminary writ in prohibition should be quashed.

POINT II

THE PRELIMINARY WRIT OF PROHIBITION SHOULD BE QUASHED BECAUSE THE CLASS CERTIFICATION ORDER DOES NOT VIOLATE AMERICAN FAMILY'S DUE PROCESS RIGHTS BY FAILING TO SATISFY THE PREDOMINANCE REQUIREMENT OF RULE 52.08 IN THAT THE TRIAL COURT PROPERLY DETERMINED THAT PLAINTIFFS' CLAIMS AND CLASS-WIDE PROOF — RATHER THAN DEFENDANT'S THEORY OF BREACH — GUIDED ITS ANALYSIS OF PREDOMINANCE AND PROPERLY CONCLUDED THAT FOR PURPOSES OF CLASS CERTIFICATION A VEHICLE'S PRE-LOSS CONDITION IS NOT A RELEVANT INQUIRY SINCE AMERICAN FAMILY IS REQUIRED TO PAY FOR PARTS OF "LIKE, KIND AND QUALITY" TO OEM PARTS AND DOES NOT CONSIDER THE CONDITION ISSUES WHEN IT SPECIFIES NON-OEM PARTS IN AN ESTIMATE.

In Point II,[32] American Family again appears to challenge the constitutionality of the class certification order by complaining that even a "Missouri-only" class violates due process. The complaint is not that multiple

[32] This is argued in section C of American Family's brief. Point II does not conform to the requirements of Rule 84.04(d)(3). Point II fails to state concisely the legal reasons for the challenge to the class certification order or to explain in summary fashion why those legal reasons support their position. Thus, the point preserves nothing for review.

insurance regulations (or some other alleged variation in law) apply to Missouri class members, but that an individualized "part by part" analysis must be performed to if the applicable insurance regulation has been violated and standard insurance policy breached. American Family then contends that these individualized issues "swamp" any other common issues and preclude a finding that the predominance element of Rule 52.08 is satisfied.[33]

American Family's argument that a "part by part" analysis must be performed to determine if a breach has occurred, is quite simply, its disagreement **on the merits** as to what constitutes a breach of the insurance contract, which is not properly resolved at the class certification stage. The trial court appropriately did not resolve this or any other merits dispute at the class certification stage and, instead, properly determined that plaintiffs' claims are susceptible to class-wide proof, such that common issues of law and fact predominate.

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[33] American Family agrees that all of its due process concerns are eliminated if each Rule 52.08 element is satisfied, including predominance, because "[i]t ensures due process for absent class members and party defendants alike." *See* American Family's brief at p. 63. In fact, "[t]he various provisions of Rule 52.08 have been carefully crafted to weigh these considerations and to assure that due process is maintained." *Beatty v. St. Louis Sewer Dist*., 914 S.W.2d 791, 795 (Mo. banc 1995).

A. Standard of Review

To justify issuance of a permanent writ of prohibition, American Family must establish that the trial court abused its discretion to the point of exceeding its jurisdiction so as to "create an injury which cannot be remedied on appeal." *State ex rel. K-Mart*, 986 S.W.2d at 169. Once again, the discretionary ruling that "common issues of law or fact predominate" cannot meet this criterion.

B. The parties disagree on the merits of what constitutes a breach of the policy, and the trial court should not resolve the merits of this dispute at the class certification stage.

It is basic "black-letter" law that the merits of plaintiffs' claims cannot be adjudicated as part of the class certification determination. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974) ("We find nothing in either the language or history of [Fed. R. Civ. P.] 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule. . . . "); *Wakefield v. Monsanto Co.*, 120 F.R.D 112, 115 (E.D. Mo. 1988) ("In determining whether to certify a class, the question before the Court is not whether the plaintiffs. . . have stated a cause of action or will prevail on the merits, but rather whether the requirements of [Fed. R. Civ. P.] 23 are met.") (citations omitted). The court "may not review the sufficiency or substantive merits of the allegations" but must accept them as true for purposes of class certification. *Jackson v. Rapps*, 132 F.R.D. 226, 230 (W.D. Mo. 1990).

American Family's predominance challenge improperly rests on a factual dispute on the merits as to whether its uniform contract interpretation and categorical choice of non-OEM parts breaches its policy. The trial court properly discounted this factual dispute in arriving at its ruling.

1. American Family contends that it only has to pay for replacement parts of "like, kind and quality" and in the same condition as the part on the insured's vehicle.

American Family contends that its policy obligations are satisfied by paying for parts of "like, kind and quality" to the actual part that is being replaced such that the pre-loss condition of the insured's vehicle is relevant.[34] Despite internal documents acknowledging the inferior nature of non-OEM parts,[35] American Family's position is that specifying non-OEM parts categorically and without any basis in fact to believe they are equivalent to OEM parts uniformly satisfies this obligation in most instances depending on the age and quality of the vehicle. Thus, American Family reasons, individualized issues "swamp" other common issues because "mini-trials" concerning the pre-loss condition of every insureds' vehicle would be required.

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[34] *See, e.g.,* American Family's brief at p. 66.

[35] *See* Plaintiffs' Appendix to A121 ("Seriously, I must state for the record, most of the sheet metal parts do not fit as good as OEM. The stampings are not as good.").

Interestingly, American Family does not rely on the plain language of its policy to support this argument. Instead, American Family contorts the Missouri Department of Insurance ("MDOI") regulations for support. In so doing, American Family concedes its contract's silence on this point. In particular, American Family contends that 20 C.S.R. 100-1.050, subparagraphs (2)(D)2.A and (2)(D)2.B, permit use of non-OEM parts so long as they are "at least equal in like, kind and quality to the original part [they are replacing] in terms of fit, quality and performance." *See* American Family's brief at p. 66.[36]

However, the regulation only applies where the insurer either prepares the estimate (subparagraph (2)(D)2.A) and/or "requires" the installation of the part (subparagraph (2)(D)2.B). In either instance, the part specified must be "at least" equal to its OEM counterpart. Here, of course, the record is absolutely clear that American Family does not "require" installation of the part, as it admittedly does

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[36] American Family's own expert, Samuel Pelzman, testified at the class certification hearing that the Missouri regulation required specification on estimates of a part of like, kind and quality <u>to the OEM part</u>:

Q: And, in fact, Missouri requires that a non-OEM part specified by the insurance company must be of like kind and quality to the OEM part, isn't that correct?

A: That's correct.

See Answer, Exh. 1, Vol. V at pp. 1116-1117.

not require its insured to repair their vehicles with the money it pays, it does not repair vehicles and has no business telling repairers what to use. *See* Answer, Exh. 1, Vol. IV at 710-715 (Moore testimony). For American Family to suggest, as it does in footnote 44 of its brief, that it does repair vehicles simply misrepresents the record.

More importantly for this class certification decision, the record is equally clear and undisputed that American Family categorically specifies non-OEM parts on vehicles without any basis in fact to believe that the non-OEM parts are categorically equal to OEM parts in any respect, much less "fit, quality and performance."

Indeed, to the extent applicable here, the Missouri regulations explicitly support plaintiffs' theory of the case. American Family is prohibited from preparing an estimate containing non-OEM parts if by doing so it is paying an amount that is less than that for which it can "reasonably [be] expected the damages can be satisfactorily repaired." 20 C.S.R. 100-1.050 subparagraph (2)(D).1. Plaintiffs challenge whether American Family, in "typically" specifying non-OEM parts, does, in fact, have a reasonable basis to believe the estimates it prepares are sufficient to pay for satisfactory repairs.[37] Thus, the predominant

[37] Note, as well, that subparagraph (D)(2)(B) of this rule requires American Family, in those instances where it "requires" the installation of the parts to "consider the cost of any modifications which may become necessary when

issue is American Family's conduct arriving at and implementing its conclusion that uniformly specifying non-OEM parts on its estimates satisfies its contractual duty to pay. Pre-loss condition does not even factor into this analysis, much less require mini-trials to determine.

2. Plaintiffs allege that American Family must pay for replacement parts of "like, kind and quality" to OEM parts.

In contrast, and consistent with the MDOI regulations, plaintiffs allege that American Family is obligated to pay its insureds for parts of "like, kind and quality" to the original equipment manufacturer's part. This is because cheaper non-OEM replacement parts are categorically inferior to OEM part regardless of their age in terms of fit, quality, corrosion protection and safety. Plaintiffs are not fully compensated for their "loss" under the policy unless they are paid a sum reflecting the cost of a part equivalent to the OEM part being replaced. Because American Family is obligated to pay for replacement parts of "like, kind and quality" to OEM parts, breach of the contract occurs when American Family specifies non-OEM parts in, and pays the claim based on, its estimates. Darnell Moore, Executive Vice President of Administration at American Family, testified

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making the repair." If, in fact, American Family thought this rule applied, it surely it would have shown that it considers whether imitation parts costs more to install, particularly given the evidence that it knew they did. *See* footnotes 34 and plaintiffs' Appendix at A121.

that American Family's estimates determine the amount of money paid for the loss. *See* Answer , Exh. 1, Vol. IV, at 713.

The pre-loss condition of the vehicle is irrelevant in determining if the non-OEM part is of "like, kind and quality" to the OEM part for several reasons. First, American Family's policy does not contain any language regarding pre-loss condition or condition at the time of the loss.[38] Second, American Family does not consider the type of part it is replacing or its condition when it writes an estimate. *See* Answer Ex. 1, Vol. IV, at 806-807. The computer estimating program it uses automatically inserts a non-OEM replacement part. *See* deposition of Frederick Zweifel, American Family's corporate designee, in plaintiffs' Appendix, at A65; and *Avery*, 746 N.E.2d at 1256 (since State Farm did not consider the pre-loss condition of an insured's vehicle when it made its decision to use non-OEM parts, the evidence is "irrelevant"). Third, despite the suggestion

[38] American Family cites *Snell v. The GEICO Corp.*, 2001 WL 1085237 (Cir. Ct. of Maryland, Aug. 14, 2001) as authority for interpreting the Missouri regulation as requiring a "part by part" evaluation. *Snell* is distinguishable because, *inter alia*, GEICO's policy in that case actually included language concerning the condition of the vehicle "at the time of the loss." *GEICO*, slip op. at 9-10. No such language is present here.

that pre-loss condition "at least" applies where the insurer elects to repair,[39] American Family ***never*** elects to repair vehicles. It *always* elects to pay for the loss in money rather than repair the vehicle. *See* Answer to Writ, Exhibit 1, Vol. IV at 710-712 (Moore testimony); and Vol. IV at 804-805 (Canney testimony); *See also* Zweifel depo., plaintiffs' Appendix, at A51-A52.

The post-repair condition of the vehicle is likewise irrelevant. American Family pays the loss based solely on the estimate. It neither conducts a pre-loss part quality inspection nor does it in any way assure replacement part quality. The policyholder is free to use that money for any purpose and may use it to repair the vehicle or not. *See* Answer Exh. 1, Vol. IV, at 713-715 (Moore testimony); and Vol. IV at 806-807 (Canney testimony). If the insured chooses not to repair their vehicle, they do not have to return the money to American Family. *Id.* at 714. Because the breach occurs when American Family specifies and pays for inferior non-OEM parts, and American Family has no right to condition payment on actual performance of the repairs, post-repair condition is irrelevant.

[39] *See* American Family's brief, at p. 67. After admitting this argument has no factual basis in the courts below, it is at minimum questionable for American Family to suggest to this court that it ever repairs vehicles. **[MOORE CITE]**

3. American Family also asserts a merits challenge to plaintiffs' evidence that non-OEM parts are inherently and uniformly inferior.

American Family makes yet another premature merits argument by disputing plaintiffs' evidence that non-OEM replacement parts are uniformly inferior to OEM parts. American Family reasons that because the MDOI rules permit their use, it necessarily implies that the MDOI believes that there must be non-OEM parts that are equal in quality to OEM parts. *See* American Family's brief at p. 67-68. American Family argues that if non-OEM parts are not categorically inferior, then an individualized analysis of those parts is required to determine if they are of "like, kind and quality." But again, plaintiffs' proof is that all non-OEM parts are categorically inferior to OEM parts because of design and manufacturing inferiorities. *See, e.g.*, class hearing testimony of Paul Griglio, plaintiffs' expert, at Answer, Exh. 1, Vol. II, at pp. 289-290. (*See also* Statement of Facts, at pp. 20). Because the process is bad, so necessarily are the part produced therefrom. Moreover, plaintiffs also submitted the affidavit of Jay Angoff, former Director of the MDOI, stating that the MDOI has no expertise with respect to determining the quality of replacement parts, and that the MDOI has not taken any position with respect to whether non-OEM parts are inferior. *See* Angoff Aff., ¶ 3(a-f), at plaintiffs' appendix A199-A210.

4. Plaintiffs established that their claims are susceptible to class-wide proof, such that common issues of law and fact predominate.

Plaintiffs have certainly met their burden on class certification by demonstration that **their** claims (not American Family's theories) are common to all plaintiffs and, importantly, can be established by class-wide proof such that common issues predominate. Plaintiffs submitted class-wide common evidentiary support for their claims, including: (i) evidence of a company-wide policy of mandating specification of inferior non-OEM crash parts (Zweifel depo., Plaintiffs' Appendix at A54); (ii) computer estimating procedures that automatically search for and place such parts on the estimate (*Id.* at A64-A65); and (iii) evidence that non-OEM parts are uniformly inferior to OEM parts because of industry-wide deficiencies in design and manufacturing processes (*see* section c. above). It is undisputed that American Family uses a standardized policy with identical language in all relevant respects. American Family even admits that plaintiffs successfully demonstrated that it "typically specified non-OEM parts for the repair of insured vehicles."[40]

[40] *See* American Family's brief at p. 65. While American Family does not automatically specify non-OEM parts for vehicles newer than three years, it does so where "the vehicle has high mileage or is in poor overall condition." *See* plaintiffs' appendix at A294 (Claim Bulletin #708, Ex. 25 to Suggestions in

Because plaintiffs demonstrated that common issues of law and fact predominate over any individualized issues, and established a practical means of proving these claims through class-wide proof, the elements of Rule 52.08 were satisfied. As American Family concedes, if all the elements of Rule 52.08 are satisfied including predominance, "it ensures due process for absent class members and party defendants alike." *See* American Family's brief at p 63. For this reason, Point II should be denied, and this Court's preliminary writ of prohibition quashed.

CONCLUSION

The trial judge properly certified a multi-state class of policyholders that were underpaid when American Family: (1) paid only for inferior non-OEM parts, rather than quality OEM parts, and/or (2) omitted certain necessary repairs from their estimates. By certifying the class, the trial court did not violate either the Due Process or Full Faith and Credit Clause of the Constitution because each of the elements of Rule 52.08 were satisfied, a rule "carefully crafted" to ensure

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Support of Plaintiffs' Motion for Class Certification); and A72 (Zweifel depo. at p. 149:11-16). This exception to "typically" specifying non-OEM parts has nothing to do with quantifying the pre-loss value of the vehicle, but was adopted because American Family believed that insureds whose vehicles were in poor condition generally did not complain about American Family's policy of paying only for cheap aftermarket parts. *Id*. at 152:23-6.

that all constitutional rights are protected. *See Beatty v. St. Louis Sewer Dist*., 914 S.W.2d 791, 795 (Mo.banc 1995).

A. Point I

American Family's first point contends that the trial court improperly applied Missouri law to every claim in the case, and that variations in state insurance regulations require application of multiple states' laws. First, the trial court did not uniformly pronounce Missouri law applicable to all claims. Second, *Shutts* permits application of Missouri law to issues where there is no conflict among the states, without the necessity of engaging in a "messy" choice of law analysis. Where there is no "true conflict," those issues may be "counted" as common issues of law under the predominance element of Rule 52.08. The insurance regulations do not inject a "true conflict". While the regulations permit use of non-OEM parts, they do not sanction use of inferior parts and, therefore, do not bear on class plaintiffs' claims. Plaintiffs demonstrated that the breach of contract law of the 14 states at issue is identical. American Family failed to articulate a single true conflict. Thus, Missouri law may fairly and constitutionally be applied to this overriding breach of contract issue.

American Family has also identified potential variations of law as to certain affirmative defenses, including the statute of limitations, the applicability of the collateral source rule, and appraisal provisions in some of its policy forms. The first two issues were discussed at length at the class certification hearing and Judge Clark found that they did not preclude certification. The potential variation

in appraisal provisions is raised for the first time in this writ proceeding. Importantly, class plaintiffs do not seek to apply Missouri law where there are "true conflicts" and did not ask that Judge Clark do so on class certification. Instead, Judge Clark carefully considered and weighed the potential variations in the law applicable to the affirmative defenses American Family properly raised – all within the trial court's discretion – to determine if the "predominance" element is satisfied. The class certification order expressly states that it "remains subject to modification, correction, restriction and/or amendment." *See* Petition, Exh. B. Thus, after determining the law applicable to particular issues (upon appropriate motion and at the appropriate time), Judge Clark properly reserved a mechanism to re-evaluate whether common issues of law or fact still predominate before trial.

B. Point II

Finally, American Family directly challenges Judge Clark's discretionary ruling that common issues of fact or law predominate by arguing that individualized analysis of the pre-loss or post-repair condition of an insured's vehicle is necessary to determine if it has breached the uniform policy obligations. American Family says this individualized inquiry "swamps" any common issues. But on class certification, it is black letter law that **plaintiffs'** theories and evidence is to be accepted as true. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-178 (1974).] Plaintiffs contend American Family's obligation under its policy is to pay for parts of "like, kind and quality" to OEM parts. Importantly, plaintiffs submitted class-wide proof supporting this claim and demonstrated how

these claims could be tried as a class action. Simply stated, American Family's agreement to pay money to adjust its policyholders' claims should be determined by the amount paid at the time it was paid. American Family does not consider pre-loss condition in making the payment. The post-repair condition of the vehicle neither discharges American Family's payment obligation nor adds to that duty.

American Family's challenge to the "predominance" element of Rule 52.08 must be viewed under the narrow standard of review applicable to issuance of an extraordinary writ of prohibition. So viewed, it clearly does not meet the governing standard for issuance of a writ in prohibition. American Family cannot show that the trial court abused its discretion, much less that an abuse of discretion occurred that is "so great as to be an act in excess of jurisdiction and is such as to create injury which cannot be remedied on appeal." *See State ex rel. K-Mart*, 986 S.W.2d at 169.

The class was properly certified and the preliminary writ should be quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via United States mail, postage prepaid this 18th day of November, 2002 to:

The Honorable Thomas C. Clark, Division 3
Judge of the 16th Judicial Circuit of the State of Missouri
Jackson County Courthouse
415 East 12th Street
Kansas City, Missouri 64106
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RESPONDENT

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CERTIFICATE OF COMPLIANCE

Pursuant to Mo.R.Civ.P. 84.06(c), counsel for Appellant certifies that Class Plaintiffs' brief complies with Mo.R.Civ.P. 55.03 and 84.06(b) and that the brief contains 14,888 words. In addition, counsel for Class Plaintiffs certify that the disk filed containing the brief has been scanned for viruses and is virus free.

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